Filed 10/9/15 P & M Vanderpoel Dairy v. Agricultural Labor Relations Bd. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

P & M VANDERPOEL DAIRY,

Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD et al.,

Respondents;

UNITED FARM WORKERS OF AMERICA,

Real Party in Interest.

F070149

(40 ALRB No. 8; Tulare Super. Ct. No. 2013-CE-016-VIS)

OPINION

ORIGINAL PROCEEDING; petition for writ of review. James Wolpman, Administrative Law Judge.

Sagaser, Watkins & Wieland, Howard B. Sagaser and Ian B. Wieland for Petitioner.

J. Antonio Barbosa, Paul M. Starkey and Laura F. Heyck for Respondent Agricultural Labor Relations Board.

No appearance for Real Party in Interest.

-ooOoo-

On petition for writ of review, P & M Vanderpoel Dairy (petitioner) challenges the decision of the Agricultural Labor Relations Board (the Board), reported at *P & M Vanderpoel Dairy* (2014) 40 ALRB No. 8, wherein the Board upheld the findings of the administrative law judge (ALJ) that petitioner committed an unfair labor practice by firing several workers for engaging in protected concerted activity. Petitioner contends the evidence was insufficient to show that the workers were actually fired, but only showed that they voluntarily quit after a requested raise was denied. Petitioner also claims the proceedings below were procedurally unfair or deprived him of due process on several grounds. We find petitioner's arguments to be unpersuasive. Accordingly, and inasmuch as the record reflects that the Board's decision was supported by substantial evidence, we affirm the decision of the Board.

FACTS AND PROCEDURAL HISTORY

Petitioner is a dairy located in Tipton, California, owned by Mike Vanderpoel (Mike) and managed on a day-to-day basis by his son, Matthew Vanderpoel (Matthew). On the morning of April 17, 2013, several dairy workers employed by petitioner discussed among themselves the idea of approaching Matthew to ask for a $1 per hour wage increase. At the time of the events in this case, the workers were paid $8 per hour, and they believed it was fair to ask for a wage increase to $9 per hour. The workers who took part in that morning discussion were Jose Noel Martinez (known as Noel), Jorge Lopez, Jose Manuel Ramirez Corona, Juan Jose Andrade, Alejandro Lopez Macias and Guadalupe Miguel Hernandez (known as Lupe). They agreed on a course of action: They would approach Matthew together, as a group, at around 6:00 p.m. later that same day, which was just after the end of the day shift and just before the beginning of the night shift. They also decided that Lupe, the only one of the group who could speak English, would act as spokesperson and interpreter for the group to present their request to Matthew for a raise.

At about 6:00 p.m. on April 17, 2013, the above named workers approached Matthew as planned. They met with him for about one-half hour in the breezeway area of the milking barn. Lupe spoke in English on behalf of the group and told Matthew (who could not speak conversational Spanish) that they were requesting a $1 per hour wage increase. According to Matthew's testimony at the hearing, Lupe *also* told him that if the workers' request for a wage increase was not met, they would quit immediately. In contrast to Matthew's account, the four workers[1] who testified at the hearing stated that they never told Lupe to tell Matthew that they would quit if they did not receive a raise. Rather, the only message the workers authorized Lupe to communicate to Matthew was to ask for the raise, and there was no discussion among them of quitting or threatening to quit.

Matthew responded to the workers' request in English and Lupe translated Matthew's response into Spanish. Matthew told them that a wage increase would only be given in the future if the workers became better at milking procedures, lowered the somatic cell count, and increased overall milk production.[2] Matthew's response, if it was final, meant there would be no immediate pay increase. The workers discussed what Matthew said and replied that they did not think it was realistic to expect an increase in milk production at that time of year because, no matter how much extra work was put in, milk production always decreases as the weather gets warmer. According to Matthew's account, the workers then insisted, through Lupe their translator, that the raise had to be

---

[1] Namely: Jose Noel Martinez, Juan Andrade, Jorge Lopez and Jose Manuel Ramirez Corona.

[2] During his testimony at the hearing, Matthew also described a conversation he had with Juan Andrade and Jose Ramirez Corona a week or so earlier in which they had asked for a raise. In that prior conversation, Matthew advised them that he would have to talk to his father about their request.

"right now" or else they were going to quit. The discussion continued to go back and forth. Nobody had quit yet, but Matthew believed they were going to do so.[3]

At 6:44 p.m., while he and the workers were still gathered in the breezeway, Matthew called his father on his cell phone. Matthew testified that he told his father (Mike) that the employees wanted a raise or else they were going to quit. His father said he would come to the dairy right away. Mike arrived at the scene within about five minutes (at 6:49 or 6:50 p.m.) and, according to the workers, he was very upset and angry when he got there and quickly began yelling at Noel Martinez. Mike admitted that he focused on Noel Martinez as he spoke, but he said he meant his comments to be directed at everyone. According to Noel, Mike came directly at him and asked him in an aggressive tone, "'Do you want your job tomorrow, yes or no?'" Noel testified that he was initially so intimidated by Mike's loud and angry manner that he was speechless, but then he asked Mike why he (Noel) was being singled out since everyone was asking for a raise. Mike's response was to repeat the question, "'Do you want your job, yes or no?'" Again, Noel answered by asking him, "'Why are you asking only me?'" Mike's account of this verbal exchange was quite different than Noel's. Mike testified that when he arrived he simply announced to the workers: "'If you want to work, you can work. If you don't want to work you have to go.'" When there was no response to this announcement, Mike repeated the same thing once or twice more. There was still no response.

Mike further testified that in telling people to leave, he was not firing anyone. Rather, his concern was on the task of getting the cows milked. He said he just wanted to be able to start milking cows for the evening shift, which was supposed to begin at 7:00 p.m., so if they (the workers) were not going to work, they needed to leave.

---

3 Matthew testified that it did not appear any of the workers actually "quit" until after his father arrived and called 911. When 911 was called, the workers left as Juan Andrade circled his hand in the air indicating they should leave.

At 6:55 p.m., only a few minutes after his arrival at the breezeway of the milking barn, and after having told the assembled workers to leave the premises, Mike called 911 in front of the workers to have law enforcement remove them from the dairy property. He announced to the workers that he was calling 911 and, to prove it, he held up his cell phone to show them the screen. The workers left the area before any police arrived.

The four workers who testified at the hearing had no doubt they had been fired. They testified that Mike's angry and loud manner, his demand that they leave, and his abrupt action of calling 911 to remove them from the property clearly conveyed the fact that Mike was firing them. Juan Andrade testified that after Mike aggressively yelled at Noel, Mike took out his cell phone, showed them that he was dialing 911 and told them all "that if we didn't leave the police [were] coming." Noel testified that Mike expressly used the Spanish word for "fired," and that Mike also said, "'You can leave, you don't have a job here anymore'" and "'[t]here's no more work for you.'" Jose Ramirez Corona testified that he did not think Mike used the word "fired," but added that "with the simple fact that he was calling the police it was clear that he was firing us." Mike and Matthew denied that they ever used the word "fired" at any time on the date in question.

The night shift began at 7:00 p.m., about the same time as the assembled group of workers left the barn. Alejandro Lopez and Jesus Castrejon were scheduled to work the night shift. Jesus had not participated in the group meeting, but stayed out by his car during that time. Jesus worked the night shift as scheduled. Alejandro Lopez, who *did* participate in the group meeting, left the meeting with his brother, Jorge Lopez, and did not work the night shift. Jorge Lopez testified that as he and his brother were going to their cars in the parking lot, George Leney, who supervises another dairy owned by Mike but resides at the P & M Vanderpoel Dairy, approached the Lopez brothers and asked whether they wanted to stay and work. They both told Leney "yes," but then Mike appeared and said "No more work for you guys. Get out." About two days later,

Alejandro Lopez went to the dairy to pick up his check. Alejandro spoke to Matthew separately and Matthew offered him his job back.

On the evening of April 17, 2013, after the meeting broke up and the workers were getting into their cars to leave, Matthew asked Juan Andrade and Jose Ramirez Corona if they would come back to work. They replied that they wanted to work even though they were asking for a raise. Matthew then told them to leave. Juan Andrade and Jose Ramirez testified they were simply asking for a raise as a request; they did not intend to make coming back to work contingent on their getting the raise.

Unfair Labor Practice Complaint and Decision by the ALJ

On April 22, 2013, an unfair labor practice charge was filed by Noel Martinez against petitioner, alleging that petitioner violated the Agricultural Labor Relations Act of 1975 (the ALRA)[4] by firing him and four other dairy workers on April 17, 2013, for engaging in protected concerted activity. The General Counsel of the Board (the general counsel)[5] then filed a formal complaint with the Board against petitioner. The complaint alleged that petitioner engaged in an unfair labor practice in violation of the ALRA for firing Noel and his coworkers for engaging in protected concerted activity of jointly seeking a wage increase. Petitioner timely filed an answer to the complaint. The matter was assigned to ALJ James Wolpman, to hear the matter and make appropriate findings of fact and conclusions of law based on the evidence. The ALJ heard the matter on February 11 and 12, 2014.

---

4 The ALRA is codified at Labor Code section 1140 et seq. Unless otherwise indicated, all further statutory references are to the Labor Code.

5 The general counsel is appointed by the Governor for a term of four years, and has final authority with respect to the investigation and prosecution of unfair labor practice charges. Employees of the general counsel's office, including attorneys and other staff, are required to perform their duties in an objective and impartial manner without prejudice toward any party. (§ 1149.)

On April 28, 2014, the ALJ issued a recommended decision and order in which it found that petitioner violated section 1153, subdivision (a), of the ALRA by discharging dairy workers because they engaged in protected concerted activity of jointly requesting a raise. In reaching its decision, the ALJ resolved a number of factual conflicts in the testimony and made credibility findings. First, the ALJ found that the workers had no further action planned besides asking for the raise, and that no one told Lupe to tell Matthew that the workers were going to quit if they did not receive the requested raise. Second, the ALJ found that Lupe did in fact, on his own, tell Matthew that the workers would quit if they did not get a raise. None of the workers, except Lupe himself, knew that a threat to quit had been made on their behalf. The ALJ found that because the workers' chosen representative (Lupe) created the misunderstanding, the initial responsibility for the confusion rested with the workers. Third, the ALJ characterized the impact on the workers of the arrival of Mike to the breezeway meeting. The ALJ found that Mike was angry, loud, aggressive and intimidating. Moreover, the ALJ found that Mike "revisited what he understood to be the threat to quit, and in an angry, loud, and intimidating manner, gave … the choice to either return to work or 'get out.…' Then, giving them little or no opportunity to respond, he brandished his cell phone and in their presence called 911 and requested police assistance in removing them from the premises." (Fn. omitted.) The ALJ found that all of the workers reasonably believed Mike was firing them.

Further, the ALJ found that Mike, by his remarks and ultimatums, had "reopened the question of whether the employees would return to work" and, thus, when the workers manifested their continued interest in retaining their employment, petitioner could not reasonably rely on Lupe's earlier statements about an intention to quit. The ALJ noted the several incidents in which the employees expressed a continuing interest in keeping their jobs. The ALJ explained: "Those incidents, coming as they did, moments after the meeting, and involving 4 of the 6 workers who attended, indicate that had the

meeting been conducted without anger and intimidation and had it not been peremptorily aborted by the summoning of the police, the true intent of the workers would have emerged; i.e., the desire for an increase in wages, but no intention to terminate their employment if it was not immediately forthcoming. Instead, Mike's conduct—hasty, angry and preemptive—not only prevented the correction of the misapprehension which Lupe's unauthorized statement had created but led the workers to conclude that they had been terminated."

The Board Affirms the ALJ

On August 28, 2014, the Board issued its written decision and order affirming the ALJ's findings and conclusions. The Board also addressed a number of exceptions and responses raised by the parties in their arguments to the Board. The Board's decision was reported at *P & M Vanderpoel Dairy* (2014) 40 ALRB No. 8. The relief granted by the ALRB included to "[r]escind the discharges of Jose Noel Castellon Marinez, Jose Manuel Ramirez Corona, Juan Jose Andrade, Alejandro Lopez Macias, and Jorge Lopez" and to make said workers "whole for all wages or other economic losses they suffered as a result of" petitioner's unlawful discharges on April 17, 2013.

Petitioner filed a petition for review of 40 ALRB No. 8 pursuant to section 1160.8. We issued a writ of review, notifying the parties that the matter would be reviewed by this court.

DISCUSSION

I. Standard of Review

Petitioner claims, among other things, that there was insufficient evidence to support the findings of the Board. The standard of review is whether the Board's findings are supported by substantial evidence on the record considered as a whole. (§ 1160.8; *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd*. (1979) 24 Cal.3d 335, 349; *Montebello Rose Co. v. Agricultural Labor Relations Bd*. (1981) 119 Cal.App.3d 1, 21.) Under this standard: "[W]e do not reweigh the evidence. If there is a

plausible basis for the Board's factual decisions, we are not concerned that contrary findings may seem to us equally reasonable, or even more so." (*Rivcom Corp. v. Agricultural Labor Relations Bd*. (1983) 34 Cal.3d 743, 756–757.) "'Furthermore, those findings and conclusions that are within the Board's realm of expertise are entitled to special deference. [Citation.] And, because the evaluation of witnesses' credibility is a matter particularly for the trier of fact, the Board's findings based on the credibility of witnesses will not be disturbed unless the testimony is "incredible or inherently improbable." [Citations.]'" (*Vessey & Co. v. Agricultural Labor Relations Bd*. (1989) 210 Cal.App.3d 629, 642, citing *Harry Carian Sales v. Agricultural Labor Relations Bd.* (1985) 39 Cal.3d 209, 220.)

Of course, we do not take a rubber stamp approach to our review of a Board decision. "'Substantial evidence' is not established by just 'any evidence' [citation] and is not shown by mere suspicions of unlawful motivation [citation]. The burden of proving unlawful conduct is on the ALRB [citation], and such conduct will not lightly be inferred [citation]. The standard of review is met, however, if there is relevant evidence in the record which a reasonable mind might accept in support of the findings. [Citation.]" (*Vessey & Co. v. Agricultural Labor Relations Bd*., *supra,* 210 Cal.App.3d at p. 642.) Where the Board has fashioned a remedy, courts will interfere only where the remedy is patently unreasonable under the statute. (*Nish Noroian Farms v*. *Agricultural Labor Relations Bd*. (1984) 35 Cal.3d 726, 745.)

Petitioner also challenges the Board's decision on the grounds of alleged procedural unfairness. Our review is not limited to whether substantial evidence supported the Board's decision. We may also consider whether an error of law was made and whether the decision was procedurally sound. (*Phillip D. Bertelsen, Inc. v*. *Agricultural Labor Relations Bd*. (1992) 2 Cal.App.4th 506, 519.) In so doing, any questions of law regarding procedural fairness are reviewed de novo.

II. Substantial Evidence Supported the Findings of Fact

The Board concluded that the record was sufficient to support the ALJ's credibility determinations and findings of fact and, therefore, it affirmed the ALJ's decision. Petitioner argues that the Board erred because the evidence was allegedly insufficient to support the finding that the employees were *fired* by petitioner. Petitioner argues that the only reasonable conclusion that may be drawn from the evidence is that the employees *quit* when they did not receive the requested raise. We disagree. Contrary to petitioner's contentions, substantial evidence in the record adequately supported the ALJ's finding that the workers were terminated.

Petitioner argues that the employees were not fired because neither Mike nor Matthew used the word "fired" in their dealings with the employees on the day in question. However, it is well settled that a discharge occurs if an employer's words or conduct would reasonably cause employees to believe they were being discharged, and in such circumstances it is incumbent upon the employer to clarify its intent. (*H & R Gunlund Ranches, Inc*. (2013) 39 ALRB No. 21, pp. 5–6, fn. 3; *Boyd Branson Flowers, Inc*. (1995) 21 ALRB No. 4, p. 2, fn. 4; *Ridgeway Trucking Co*. (1979) 243 NLRB 1048, 1054–1055, enforced *N.L.R.B. v. Ridgeway Trucking Co.* (5th Cir. 1980) 622 F.2d 1222, 1224; *N.L.R.B. v. Trumbull Asphalt Company of Delaware* (8th Cir. 1964) 327 F.2d 841, 843 ["It is sufficient if the words or action of the employer 'would logically lead a prudent person to believe his tenure had been terminated.'"].)

As discussed in our factual summary above, the ALJ (as affirmed by the Board) credited the testimony that Mike was angry, loud and intimidating when he confronted the group of workers that were jointly requesting a raise in the breezeway of the milking barn. The testimony reflected that Mike ignored Noel and other workers when they reasonably asked why Mike was singling Noel out. At the same time, Mike's question or ultimatum to the workers that they decide whether they will work or get out reasonably appeared to reopen the issue of whether the workers intended to continue their jobs or

not. Further, as the ALJ found, Mike unfortunately gave the workers little or no meaningful opportunity to respond to his question, because he so quickly resorted to calling 911. Under all of the circumstances, including Mike's loud and angry manner, his demand that the workers leave, and his action of abruptly calling 911 to have law enforcement come remove them, the workers clearly had a reasonable basis for believing they had been terminated from their employment. Because the words and conduct of the employer would reasonably cause the employees to believe they were being discharged, the finding that the employees were discharged was supported by substantial evidence whether or not the word "fired" was ever used by Mike or Matthew.

Petitioner next argues that because the workers' selected interpreter and spokesperson, Lupe, initially told Matthew that the workers would quit if they did not receive the requested $1 per hour raise in pay, the workers cannot claim they were fired. (See *Hansen Farms* (1976) 2 ALRB No. 61, p. 4, fn. 4 [objection to interpreter's translation overruled when he was acting as designated agent]; see also *Bromine Division, Drug Research, Inc*. (1977) 233 NLRB 253, 261 [if striker directly communicates an intention to quit, there must be some showing of reservation or qualification or continued interest before the Board will ignore that stated intention].) In other words, petitioner takes the position that the workers remained bound by Lupe's statement that they would quit.

To address petitioner's argument, we briefly recapitulate the entirety of the relevant circumstances. Crediting the workers' testimony, the ALJ found that the workers did not tell Lupe to make a threat to quit on their behalf, and they did not know that Lupe had done so. Nevertheless, the ALJ acknowledged that since the workers chose Lupe to be their spokesperson, "the responsibility for the confusion" initially rested with them. However, the ALJ also found that the situation changed when Mike entered the scene and presented his questions calling on the workers to make a choice. The ALJ reasonably found that Mike had *reopened* the issue of the workers' intentions, but before

the workers had time to clarify what they would do, Mike peremptorily told them to leave and called 911. Moreover, as the record showed, several incidents and conversations right after the meeting indicated the workers *did* have a continuing interest in keeping their jobs, and would have continued in their employment if they had not been terminated by Mike.[6] Thus, the ALJ reasonably concluded that the situation in the breezeway of the milking barn did not remain static after Lupe's initial statements to Matthew, but changed significantly as a result of Mike's intervening conduct and questions.

In light of the facts and circumstances found by the ALJ, all of which were clearly supported by the testimony at the hearing and reasonable inferences therefrom, we reject petitioner's argument that the workers remained bound by Lupe's initial (unauthorized) statement to Matthew. Instead, as a result of Mike's intervention and demand for a decision, the matter of the workers' intentions was reopened. Unfortunately, however, before the workers had a chance to clarify their intentions, they were fired by Mike when he abruptly ordered them to leave and called 911, all as the ALJ reasonably concluded. In short, the evidence was sufficient to show the workers were terminated.

III. No Due Process Violation Shown

Petitioner makes a number of claims of basic procedural unfairness relating to the proceedings below. To provide a contextual framework, we begin our discussion of the due process issues with a brief overview of some of the basic procedural rules applicable to ALRB proceedings regarding charges of unfair labor practices.

A. Overview of ALRB Procedural Rules

Any person may file a charge that another person has engaged in or is engaging in an unfair labor practice under the ALRA. (Cal. Code Regs., tit. 8, § 20201.) Whenever a charge of unfair labor practices has been filed with the Board, the Board (through the

---

[6] For example Alejandro and Jorge Lopez, in going to the parking lot right after Mike told them to leave and called 911, were approached by George Leney, who asked them if they wanted to stay and work. Both workers responded in the affirmative.

general counsel) may issue a formal complaint against the person charged "stating the charges in that respect, and containing a notice of hearing before the board or a member thereof, or before a designated agency or agencies, at a place therein fixed, not less than five days after the serving of such complaint." (§ 1160.2).[7] The complaint "shall state with particularity the conduct which is alleged to constitute an unfair labor practice." (Cal. Code Regs., tit. 8, § 20220, subd. (a).) "The person so complained against shall have the right to file an answer to the original or amended complaint and to appear in person … and give testimony at the time and place fixed in the complaint.… Any such proceeding shall, so far as practicable, be conducted in accordance with the Evidence Code. All proceedings shall be appropriately reported." (§ 1160.2) The parties are entitled to subpoena witnesses to appear and testify at the hearing. Specifically, upon the request of any party to the proceedings, the Board is required to issue a subpoena or subpoenas "requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding …." (§ 1151, subd. (a).) The Board, through its general counsel or other attorney, has the burden of proving by a preponderance of evidence that the person charged has, in fact, committed the alleged unfair labor practice. (§ 1160.3.)

The ALRB has adopted several regulations that further articulate the procedural rights of the parties. As declared in California Code of Regulations, title 8, section 20269, any party to the proceeding "shall have the right to appear at the hearing in person, or by counsel or other representative; to call, examine, and cross-examine witnesses; [and] to introduce all relevant and material evidence …." Further, California

---

[7] A complaint premised on the charges filed may be issued only by the general counsel, not by the Board. (*Belridge Farms v. Agricultural Labor Relations Bd*. (1978) 21 Cal.3d 551, 557–558 [so holding].) "If, after investigation, the general counsel has reason to believe that an unfair labor practice has been committed, he or she shall issue a formal complaint in the name of the Board." (Cal. Code Regs., tit. 8, § 20220, subd. (a).) The general counsel of the Board is vested with "final authority … with respect to the investigation of charges and issuance of complaints under Chapter 6 (commencing with [Labor Code] Section 1160) of this part, and with respect to the prosecution of such complaints before the board." (Lab. Code, § 1149.)

Code of Regulations, title 8, section 20250, subdivision (a), reiterates that the Board shall, upon the request of any party to the proceeding, "prior to [the] hearing, issue subpoenas … requiring the attendance and testimony of witnesses and/or the production of any materials …." The same regulation provides that "[r]equests for subpoenas during the hearing shall be made to the administrative law judge." (*Ibid.*) The ALJ's powers during the hearing include the granting of applications for subpoenas. (*Id.*, § 20262, subd. (b).) Continuances of the hearing (including after the hearing has commenced) may be granted at the request of a party based on a showing of good cause, including where a continuance is necessary in the interests of justice. (*Id.*, § 20190, subds. (d) & (e)(7).)

Prehearing discovery rights are fairly limited. A bill of particulars procedure is provided for in the regulations. "Where a complaint lacks specificity as to the time, place or nature of the alleged conduct, or the identity of the persons who engaged in it …, a written request for particulars may be made by the respondent in accordance with [California Code of Regulations, title 8,] section 20237 to obtain such information; provided, however, that in responding the general counsel need not disclose the identity of any potential witness whose primary source of income is non-supervisory employment in agriculture." (Cal. Code Regs., tit. 8, § 20235.) Further, upon written request, a party to a hearing is entitled to obtain from any other party to the hearing "the names, addresses and any statements … of all witnesses, other than those whose primary source of income is non-supervisory employment in agriculture …." (*Id.*, § 20236, subd. (a).) Additionally, upon written request, a party shall be "afforded a reasonable opportunity to examine, inspect and copy … any writing or physical evidence" in the possession or control of the other party and "which that party intends to introduce into evidence at hearing; provided, however, that any portion of a writing which identifies a potential witness whose primary source of income is non-supervisory employment in agriculture shall be excised …." (*Id.*, subd. (c).) Finally, upon written request, the general counsel is

required to "disclose to respondent any evidence which is purely and clearly exculpatory." (*Id.*, subd. (d).) Requests for discovery pursuant to California Code of Regulations, title 8, sections 20235 and 20236 "shall be made no later than 15 days following service of the answer, and responses shall be due 15 days after receipt of the request" and such requests "shall be deemed continuing." (*Id.*, § 20237, subds. (a), (b) & (c).)

As the above regulations reflect, the identities of witnesses who are nonsupervisory agricultural workers and any witness statements obtained from them during the general counsel's investigation are not disclosed via prehearing discovery requests. (See, e.g., Cal. Code Regs., tit. 8, §§ 20235, 20236.) It is only after the direct examination of such a witness at the hearing (i.e., prior to his or her cross-examination) that the ALJ may order production of any statements of the witness. (*Id.*, § 20274.) As carefully explained in the Board's decision in *Giumarra Vineyards* (1977) 3 ARLB No. 21, pages 7 to 9, the reason for this rule is to avoid witness intimidation of vulnerable agricultural employees by either employers or unions and to encourage such witnesses to cooperate fully and provide information without fear of reprisal.

If circumstances warrant, the Board may grant an application by either party to take a witness's deposition prior to the hearing. Pursuant to California Code of Regulations, title 8, section 20246: "Witnesses shall be examined orally under oath, except that after the issuance of a complaint, testimony may be taken by deposition, if the witness will be unavailable for the hearing within the meaning of Evidence Code Section 240, or where the existence of special circumstances makes it desirable in the interest of justice."

Finally, the procedures followed in unfair labor practice cases include the conducting of a prehearing conference. The agenda for the prehearing conference includes "(1) [a] thorough discussion of the issues and positions of the parties, including a careful explanation of the factual and legal theories relied upon …." and "(2) … [a]ny

remaining disputes concerning compliance with the provisions of *Giumarra Vineyards*, [*supra*,] 3 ALRB No. 21, and any outstanding subpoenas." (Cal. Code Regs., tit. 8, § 20249, subd. (c), italics added.)

B. Petitioner's Due Process Claims

Petitioner's several claims of procedural unfairness or due process violations may be grouped under two main headings: (1) that the general counsel's manner of conducting the case unfairly prejudiced petitioner or deprived petitioner of due process and (2) that petitioner was denied a fair hearing because of the discovery limitations imposed under the ALRB rules. As explained below, we conclude that petitioner failed to cogently demonstrate the validity of such claims and also failed to show that any prejudice resulted. Therefore, petitioner failed to meet its burden as the appealing party and we reject the claims of procedural unfairness or of due process violations, as more fully explained below. In addition, on the record before us, it appears that petitioner received a fair hearing on the unfair labor practice charges.

1. General Counsel's Conduct of the Case

First, petitioner argues that the general counsel conducted the case in an improperly partial or biased manner by failing to call Lupe as a witness in the case. According to petitioner, because Lupe was a critical witness in the case as the sole bilingual spokesman and interpreter of the workers' discussion with Matthew, the general counsel's failure to call him as a witness prevented petitioner from having a fair and objective hearing based upon all the relevant evidence. We reject this argument because petitioner could have protected its right to examine Lupe on the stand by subpoenaing Lupe to appear and by calling him as a witness itself, in accordance with the applicable statutory and regulatory provisions. (Lab. Code, § 1151, subd. (a); Cal. Code Regs., tit. 8, §§ 20250, subd. (a), 20269.) Thus, petitioner had the opportunity to ensure Lupe would appear and testify at the hearing, but it simply failed to do so. Additionally, since the ALJ credited Matthew's testimony of what Lupe said, which was in accordance with

petitioner's version of the facts, petitioner has failed to show that he suffered any significant prejudice. Although petitioner suggests the general counsel must have been withholding exculpatory evidence by failing to call Lupe, nothing in the record supports the petitioner's characterization of the general counsel's actions. We therefore reject such characterization as speculation.

For the same reasons, the Board correctly declined to draw any unfavorable inference under Evidence Code sections 412 and/or 413 from the general counsel's failure to call Lupe as a witness. Such an inference is permitted where a party suppresses evidence within its control or introduces weaker or less satisfactory evidence than was within its power to produce. (See Evid. Code, §§ 412, 413; *The Garin Company* (1985) 11 ALRB No. 18, pp. 3–4.) However, an unfavorable inference is not drawn where, as here, the witness in question was available to either party. (*Patton v. Royal Industries, Inc*. (1968) 263 Cal.App.2d 760, 769; *Davis v. Franson* (1956) 141 Cal.App.2d 263, 270; *The Garin Company*, *supra*, pp. 3–4.)

In addition to the above considerations, we note that under Evidence Code section 411, direct evidence of a single witness who is entitled to full credit is sufficient for proof of that fact. Here, the workers who testified at the hearing gave their direct account of what they told Lupe to say, and Matthew gave his testimony of what Lupe said to him, and all such direct evidence of these witnesses was fully credited by the ALJ. The general counsel could reasonably have concluded that Lupe's testimony was cumulative or unnecessary in light of the other testimony provided at the hearing, and to the extent petitioner would disagree with such an assessment, we would reiterate that nothing prevented petitioner from subpoenaing Lupe to appear and testify. Finally, we would add that a reasonable amount of prosecutorial or attorney discretion must be accorded to the general counsel as to which of many witnesses to call to prove a prima facie case of unfair labor practices (§ 1149), and absent some indication to the contrary, we do not imply improper motives or foul play regarding the particular witnesses called.

For all of these reasons, petitioner has failed to demonstrate that the general counsel's failure to call Lupe as a witness showed partiality or otherwise deprived petitioner of a fair hearing.

Second, petitioner argues that the general counsel's handling of the case was unfairly biased or partial because the general counsel failed during its investigation to take written witness statements from each of the agricultural workers who subsequently testified at the trial.[8] According to petitioner, this failure deprived petitioner of the opportunity to review written witness statements at the hearing after direct examination of each of those witnesses, which would have provided needed discovery to assist petitioner in cross-examination and facilitate a more objective trial of the issues. Petitioner's argument fails because there is nothing in *Giumarra Vineyards*, *supra*, 3 ALRB No. 21, or in the applicable regulations (see Cal. Code Regs., tit. 8, §§ 20236, 20274), that affirmatively *requires* the general counsel to obtain written witness statements. Indeed, petitioner cites no authority for its contention that the general counsel *must* obtain written witness statements from agricultural workers. Accordingly, the rule that such witness statements be turned over after direct examination of the witness apparently applies only where worker declarations or statements were actually taken in the first place. Although having a witness statement would be useful or beneficial for purposes of cross-examination, we believe that counsel would still be able to conduct meaningful cross-examination even without such statements. Moreover, petitioner has not shown it was denied a fair trial or otherwise prejudiced by the lack of written witness statements in this case.

Third, petitioner focuses on a stray comment made by general counsel. In posthearing briefing filed with the Board, the general counsel argued why it was

---

8 Only one witness gave a declaration in writing. That was the statement filed by Jose Noel Martinez with the Board to support the unfair labor practice charge itself.

allegedly proper for the ALJ to restrict questioning of witnesses about their immigration status. In the course of that argument, the general counsel stated that petitioner's attorney was attempting to intimidate the witnesses by raising the specter of immigration enforcement, and that doing so was "'prompted by … the language [the witness] spoke and the color of his skin.'" The Board, in its decision, strongly admonished the general counsel for making such an inflammatory comment about petitioner's counsel's motivations. Thus, the Board clearly recognized that the general counsel's comment was unsubstantiated and inappropriate. Moreover, there is no evidence in the record that either the ALJ or the Board (as ultimate finder of fact) were influenced in any way by the general counsel's statement or that they acted with any prejudice toward petitioner.

In summary, petitioner has failed to show that the conduct of the general counsel regarding the investigation or prosecution of this case unfairly prejudiced petitioner or denied it a fair and impartial hearing.

2. Pretrial Discovery Limitations

Petitioner takes issue with the prehearing discovery limitations placed on ALRB proceedings in unfair labor practices cases, claiming that the limitations are procedurally unfair. Petitioner argues that while the general counsel is able to conduct a formal investigation into the charges, including the issuance of investigative subpoenas (see Cal. Code Regs., tit. 8, § 20217), the persons charged with unfair labor practices (such as petitioner) have very little ability to conduct pretrial discovery. Petitioner notes that a bill of particulars procedure is available, but contends its value is limited because the general counsel is entitled to conceal the identity of any potential witness whose primary source of income is nonsupervisory employment in agriculture. (*Id.*, § 20235.) Similarly, although the identity and statements of most witnesses are discoverable, there is one major exception: no such discovery is available with respect to witnesses whose primary source of income is nonsupervisory employment in agriculture. (*Id.*, § 20236.) According to petitioner, because the key witnesses in unfair labor practice cases are often

agricultural laborers, the fact that their identities and statements are kept confidential until they actually testify at the hearing deprives defending parties such as petitioner of due process.

From the above summary, it is apparent that the main focus of petitioner's attack on the ALRB's discovery limitations is on the rule protecting from pretrial disclosure the identities and statements of any witnesses who are agricultural laborers. Preliminarily, we briefly review the policy rationale and purpose behind that rule. In *Giumarra Vineyards, supra*, 3 ALRB No. 21, pages 7 to 9, the Board explained that the restriction on prehearing discovery of agricultural workers' identities and statements is necessary to ensure the cooperation of such witnesses who might otherwise fear reprisal if it became known they were providing information in the investigation or prosecution of unfair labor practices. Specifically, the rule serves to prevent witness intimidation of vulnerable agricultural employees by either employers or unions, and encourages such witnesses to cooperate fully and provide information without fear of reprisal. (*Ibid*.) In adopting this protective rule, the Board followed National Labor Relations Board (NLRB) practice and established National Labor Relations Act (29 U.S.C.S. § 151 et seq.; NLRA) precedent. (*Giumarra Vineyards, supra*, 3 ARLB No. 21, p. 8, fn. 3 [specific NLRA cases referenced]; see § 1148 [requiring the Board to follow applicable NLRA precedents].)

In responding to petitioner's argument, the Board correctly notes that the weight of authority among the federal circuit courts is that the amount of prehearing discovery afforded is within the discretion of the NLRB, and that the absence of broader pretrial discovery than provided under NLRB regulations is not by itself a denial of due process. (*D'Yourville Manor, Lowell, Mass. v. N.L.R.B.* (1st Cir. 1975) 526 F.2d 3, 7; *N.L.R.B. v. Interboro Contractors, Inc*. (2d Cir. 1970) 432 F.2d 854, 858–859, cert. den. (1971) 402 U.S. 915; *N.L.R.B. v. Valley Mold Co., Inc*. (6th Cir. 1976) 530 F.2d 693, 694–695, cert. den. (1976) 429 U.S. 824; *N.L.R.B. v. Vapor Blast Manufacturing Company* (7th Cir. 1961) 287 F.2d 402, 407, cert. den. (1961) 368 U.S. 823; *Electromec Design and*

Development Company v. N.L.R.B. (9th Cir. 1969) 409 F.2d 631, 635; *N.L.R.B. v. Leprino Cheese Company* (10th Cir. 1970) 424 F.2d 184, 187, cert. den. (1970) 400 U.S. 915.)[9]

The Board further notes that, even though the United States Supreme Court has not had an occasion to rule on the NLRB's discovery restrictions under a due process analysis, that court *has* discussed the important policy reasons supporting those restrictions. In *NLRB v. Robbins Tire & Rubber Co*. (1978) 437 U.S. 214 (*Robbins*), the Supreme Court addressed the question of whether employee witness statements were obtainable via a request pursuant to the Freedom of Information Act (5 U.S.C.S. § 552 et seq.; FOIA). Preliminarily, the Supreme Court noted that, historically, "the NLRB has provided little prehearing discovery in unfair labor practice proceedings …," adding that, "[w]hile the NLRB's discovery policy has been criticized," the NLRB's position that the NLRA "commits the formulation of discovery practice to its discretion has generally been sustained by the lower courts." (*Robbins*, *supra*, at pp. 236–237, fn. omitted.) In reaching the merits of the question before it, the Supreme Court held that employee witness statements fell within the FOIA exemption protecting investigatory records, the disclosure of which would interfere with enforcement proceedings. Critical to its finding that pretrial production of employee witness statements would interfere with NLRB proceedings, the Supreme Court recognized the significant chilling effect on the cooperation of employee witnesses if the information or their identities became discoverable under the FOIA: "The most obvious risk of 'interference' with enforcement proceedings in this context is that employers or, in some cases, unions will coerce or

---

9 As conceded by the Board, at least one federal circuit, the Fifth Circuit, without rejecting the NLRB's discretion to limit discovery, has nevertheless allowed deposition discovery under the NLRB rule permitting depositions where good cause is shown. (*N.L.R.B. v. Rex Disposables, Div. of DHJ Industries, Inc*. (5th Cir. 1974) 494 F.2d 588, 591–592; *N.L.R.B. v. Miami Coca-Cola Bottling Company* (5th Cir. 1968) 403 F.2d 994, 996; *N.L.R.B. v. Safway Steel Scaffolds Company of Georgia* (5th Cir. 1967) 383 F.2d 273, 277.)

intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all. This special danger flowing from prehearing discovery in NLRB proceedings has been recognized by the courts for many years, [citations]. [¶] … As the lower courts have recognized, due to the 'peculiar character of labor litigation[,] the witnesses are especially likely to be inhibited by fear of the employer's or—in some cases—the union's capacity for reprisal and harassment.' [Citations.] … [¶] Furthermore, both employees and nonemployees may be reluctant to give statements to NLRB investigators at all, absent assurances that unless called to testify in a hearing, their statements will be exempt from disclosure until the unfair labor practice charge has been adjudicated." (*Robbins, supra*, at pp. 239–240, fn. omitted.)

Here, as with the NLRA, the ALRA does not include provisions relating to pretrial discovery. However, the ALRA gives to the Board the power to promulgate rules and regulations in order to carry out the purposes of the ALRA. (§ 1144.) The Board has exercised its discretion to promulgate regulations providing for some pretrial discovery, as discussed herein, subject to the regulations' express limitation on discovery of the identities and statements of nonsupervisory agricultural workers. (See, e.g., Cal. Code Regs., tit. 8, §§ 20235, 20236.) It has imposed that particular limitation for the same reasons as explained in the NLRB decisions; namely, to protect vulnerable workers from witness intimidation and encourage them to cooperate without fear of reprisal from either employer or union. (See *Giumarra Vineyards, supra*, 3 ARLB No. 21, pp. 7– 9.) The Board believes this protective measure is necessary to carry out the purposes of the ALRA. (*Giumarra Vineyards, supra*, at pp. 7–9.)

Generally speaking, as pointed out by the Board in its briefing herein, (1) there is no inherent due process right to prehearing discovery in administrative proceedings and (2) the scope of discovery in an administrative hearing is governed by statute and by the agency's discretion. (*California Teachers Assn. v. California Com. on Teacher Credentialing* (2003) 111 Cal.App.4th 1001, 1012; *Cimarusti v. Superior Court* (2000)

79 Cal.App.4th 799, 808–809; *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 302.) At the same time, we are also aware that discovery may be required where a refusal to do so would so prejudice a party as to deny him or her a fair hearing and thereby violate due process. (*Monilef v. Janovici*, *supra*, at p. 302; see, e.g., *Shively v. Stewart* (1966) 65 Cal.2d 475, 479 ["Statutory administrative procedures have been augmented with common law rules whenever it appeared necessary to promote fair hearings and effective judicial review."].)

Having set the stage by framing the parties' positions above, we conclude that petitioner has failed to meet its burden on appeal concerning its claim that the subject discovery limitation caused a violation of due process or resulted in proceedings that were fundamentally unfair. We so conclude for two basic reasons. First, we find that petitioner's briefing failed to provide adequate citation to authority and cogent legal argumentation addressing the complexities of the issue. Petitioner ignored analogous NLRB cases holding that such discovery limitation does not by itself create a due process problem, and failed to address the question of whether the ALRB's interest in protecting vulnerable workers from fear of reprisal (as a means of carrying out the purposes of the ALRA) would justify some degree of discovery restriction.[10] Moreover, petitioner has failed to cite or discuss any California cases analyzing the question of prehearing discovery in the context of administrative proceedings. In short, petitioner simply described the discovery limitations that exist under the ALRB and asserted, in *conclusory* fashion, that the limitation violated due process. Because of the cursory or perfunctory nature of petitioner's assertion of the due process argument, we shall treat it as forfeited or waived on appeal. (See *Placer County Local Agency Formation Com. v. Nevada County Local Agency Formation Com*. (2006) 135 Cal.App.4th 793, 814 ["We need not

---

10 It is recognized that "the particular interests at issue must be considered in determining what kind of hearing is appropriate." (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 565–566.)

address points in appellate briefs that are unsupported by adequate factual and legal analysis."]; *Nelson v. Avondale Homeowners Assn*. (2009) 172 Cal.App.4th 857, 862; *Landry v. Berryessa Union School Dist*. (1995) 39 Cal.App.4th 691, 699–700.)[11]

Second, petitioner has failed to demonstrate that in the particular proceedings and circumstances below, it was actually prejudiced by the discovery rules complained of or did not receive a fair and impartial hearing of the issues. Reasonable notice and a reasonable opportunity to be heard are the key components of what due process requires. (*Saleeby v. State Bar*, *supra*, 39 Cal.3d at pp. 565–566; *Drummey v. State Bd. of Funeral Directors* (1939) 13 Cal.2d 75, 80–81; *Bockover v. Perko* (1994) 28 Cal.App.4th 479, 486.) Here, petitioner had the right to subpoena witnesses to attend and testify at the hearing (§ 1151, subd. (a)), and had the right to cross-examine witnesses called by the general counsel. Based on our review of the entire record, and notwithstanding the pretrial discovery limitations referred to by petitioner, it appears that petitioner was able to adequately and fairly present its position to the ALJ and the Board.

For all of the above reasons, in the present case we reject petitioner's due process challenge to the Board's pretrial discovery limitations.

---

11 Petitioner also contends, in conclusory fashion, that the remedies granted by the Board were punitive. We find that petitioner's contention is unsupported by adequate legal argument and citation to authority; therefore, we disregard it and treat it as forfeited. (See *Placer County Local Agency Formation Com. v. Nevada County Local Agency Formation Com.*, *supra*, 135 Cal.App.4th at p. 814 ["We need not address points in appellate briefs that are unsupported by adequate factual and legal analysis."]; *Nelson v. Avondale Homeowners Assn.*, *supra*, 172 Cal.App.4th at p. 862; *Landry v. Berryessa Union School Dist.*, *supra*, 39 Cal.App.4th at pp. 699–700.)

DISPOSITION

The Board's decision in *P & M Vanderpoel Dairy*, *supra*, 40 ALRB No. 8 is affirmed. Costs on appeal are awarded to the Board.

_____
KANE, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
PEÑA, J.